MALAYSIA NATIONAL INSURANCE SDN BHD

v.

TAN KONG MIN

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
PAJAN SINGH GILL JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-348-96]
11 MAY 2003

CIVIL PROCEDURE: *Action - Limitation period - Action for recovery of moneys secured by charge - Whether action time-barred - Whether trial judge erred in applying s. 6(1) of Limitation Act 1953 - Whether s. 21 of Limitation Act 1953 to apply*

The respondent obtained a loan from the appellant to purchase a piece of land ('the said property') and executed a first legal charge over the said property in the appellant's favour. The respondent defaulted on the loan repayments and the appellant foreclosed the property by way of a public auction. However, the proceeds from the sale of the said property did not cover the amount due. Subsequently, on 17 March 1995, the appellant commenced legal proceedings against the respondent for the balance sum due.

The High Court judge, in relying upon s. 6(1) of the Limitation Act 1953 ('the Act'), dismissed the appellant's claim on the premise that the said claim was time-barred as the appellant should have filed the suit within six years from the date the appellant sent its notice to the respondent, which was on 26 September 1986.

The appellant appealed against the said decision, contending that the trial judge had erred in law by not considering s. 21 of the Act. The issue before this court was whether ss. 6(1) or 21(1) would apply with regard to the limitation matter.

Held:
Per Pajan Singh Gill JCA

[1] The loan agreement in nature was a charge agreement which was executed between the parties and it governed the respondent's liabilities. Section 6(1) of the Act applies to an action founded in contract and tort, and certain other actions, whereas s. 21 of the same relates specifically to an action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land. (p 142 d)

[2] The appellant's claim was not founded on a contract or tort action. It was purely a case for the recovery of a shortfall sum due under cl. 7 of the loan agreement and not under the provisions of the contract. Therefore, s. 21(1) of the Act applies and not s. 6(1), and even if the cause of action did arise on 26 September 1986 as held by the trial judge, the civil suit was filed on 17 March 1995 and was thus well within the 12 years' limit. (p 142 f)

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah mengambil suatu pinjaman daripada perayu untuk membeli sebidang tanah dan telah menyempurnakan gadaian pertama ke atas tanah tersebut untuk faedah perayu. Responden gagal menyempurnakan pembayaran semula pinjaman tersebut dan perayu telah menghalang-tebus tanah tersebut melalui suatu lelong awam. Akan tetapi, hasil jualan tanah tersebut gagal melangsaikan hutang responden. Sejurus kemudian, pada 17 Mac 1995, perayu telah memulakan tindakan undang-undang terhadap responden untuk baki hutang tersebut.

Berpandukan s. 6(1) Akta Had Masa 1953 ('Akta'), hakim Mahkamah Tinggi telah menolak permohonan perayu atas alasan ianya berada di luar had masa yang dibenarkan kerana perayu sepatutnya memulakan tindakan tersebut dalam masa enam tahun daripada tarikh ia menghantar notis kepada responden, yang dibuat pada 26 September 1986.

Perayu membuat rayuan terhadap keputusan tersebut, sambil mengadu bahawa hakim bicara tersilap dari segi undang-undang kerana gagal mempertimbangkan s. 21 Akta. Isu di hadapan mahkamah ini adalah sama ada s. 6(1) atau s. 21(1) terpakai berkenaan perkara had masa.

Diputuskan:
Oleh Pajan Singh Gill HMR

[1] Perjanjian pinjaman tersebut pada asasnya merupakan satu perjanjian gadaian di antara pihak-pihak tersebut dan liabiliti responden tertakluk kepadanya. Seksyen 6(1) Akta terpakai kepada tindakan yang berlandaskan kontrak atau tort, dan beberapa tindakan lain, manakala s. 21 Akta khasnya bersangkut-paut dengan tindakan untuk mendapatkan semula wang yang didapatkan melalui gadai-janji atau gadaian atau untuk mendapatkan semula hasil jualan tanah.

[2] Tuntutan perayu tidak berpandukan kepada tindakan tort atau kontrak. Pada hakikatnya, ia merupakan satu tindakan untuk mendapatkan baki hutang yang wujud di bawah kl. 7 perjanjian tersebut dan bukannya di bawah peruntukan kontrak. Oleh yang demikian, s. 21 terpakai dan bukannya s. 6(1), dan walaupun kausa tindakan wujud pada 26 September 1986 sepertimana yang diputuskan oleh hakim bicara, kes sivil tersebut telah difailkan pada 17 Mac 1995 dan oleh itu sememangnya berada dalam lingkungan hadmasa 12 tahun.

Rayuan dibenarkan dengan kos.]

Case(s) referred to:
Kong Ming Bank Bhd v. Sim Siok Eng [1982] 2 MLJ 205 ***(refd)***
Ramdin v. Kalka Pershah [1884-1885] LRIA 12 ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1)(a), 21(1)

For the appellant - John Wong Yok Hon; M/s Azim, Tunku Farik & Wong
For the respondent - SM Appaduray (Mohd Rosli Yusoff); M/s Appaduray & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-40-95]

Reported by M Maheswaran

JUDGMENT

Pajan Singh Gill JCA:
In a nutshell, this appeal before us revolves around a salient aspect in regard to the issue of limitation in an instance where there is a foreclosure action and in the event that monies realised from the sale did not satisfy the amount outstanding, whether a further action instituted to recover the amount outstanding would be barred under the provisions of s. 6(1)(a) or s. 21 of the Limitation Act 1953 ("the Act").

The appellant, an insurance company, had issued a life insurance policy to the respondent. On 28 March 1984 the appellant approved a housing loan application by the respondent for an amount of RM142,000 with an interest rate of 12% per annum. The respondent by way of security, among others, being the registered proprietor of land held under title No. G.M. 1984, Lot No. 11393, Mukim of Kuala Kuantan, Pahang (hereinafter referred to as "the said land"), created a first legal charge over the said land in favour of the appellant. The respondent defaulted in the repayment of the loan.

On 18 September 1986, the appellant through its solicitors, demanded payment of arrears of the unpaid instalments amounting to RM6,036 towards the loan and a further sum of RM1,977.80 towards the insurance premium, both amounts totalling to a sum of RM8,013.80. Since there was no response from the respondent, the appellant exercised its statutory rights to the charge and foreclosed the said land by way of a public auction on 16 March 1992. The said land was sold for RM80,100 leaving a balance of RM255,912.52 still due and owing from the respondent to the appellant as at 16 March 1992 with interest still accruing thereon until full settlement.

Clause 7 of the Annexure to the charge document ("the said cl. 7") reads as follows:

> 7. If the amount realised by the Lender on a sale of the Said land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues, costs, rents, rates, taxed and other outgoings on the Said Land is less than the amount due to the Lender and whether at such sale the Lender is the purchaser or otherwise the Chargor (s) shall pay to the Lender the difference between the amount due and the amount so realised and until such payment will also pay interest on such balance at the Prescribed Rate as aforesaid with monthly rests.

Under the terms of the said cl. 7, the respondent as chargor had agreed to pay the appellant the difference between the amount due and the amount realised from the sale and until such payment, will also pay interest on the balance due at the prescribed rate with monthly rests.

Two further notices dated 18 August 1994 and 11 November 1994 were sent to the respondent demanding payment of the amount outstanding but it was of no avail. On 17 March 1995 the appellant commenced legal proceedings against the respondent for the balance sum due and owing by the latter.

In the court below the respondent relied on the defence of limitation and laches and on the contention that the loan agreement was illegal and void and was prohibited by law. At the conclusion of the case the learned judge dismissed the appellant's claim on the ground that it is time-barred and held that since the cause of action arose on 26 September 1986, ie, the date the appellant sent the first notice to the respondent, the appellant should have filed the suit against the respondent within six years from that date, and, if necessary, have the suit stayed pending the outcome of the foreclosure action sale.

At the appeal before us counsel for the appellant referred to s. 6(1)(a) of the Act and contended that the learned judge had erred in law in not considering the provisions of s. 21 of the same. He however candidly admitted that neither he nor counsel for the respondent had drawn the learned judge's attention to s. 21 of the Act.

Section 6(1) of the Act read as follows:

> 6. Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

Section 21(1) of the Act read as follows:

> 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

It is not disputed that the civil suit arose out of the provisions of the said cl. 7, and the main question to be decided with regard to limitation, is whether the provisions of s. 6(1) or s. 21(1) of the Act apply.

The learned trial judge in considering the period of limitation came to the conclusion that the cause of action accrued seven days after 18 September 1986 *viz*., the date the first notice of demand was sent, and that the appellant could only enforce its rights, under the said cl. 7, after the auction sale had been concluded. He rejected the appellant's argument that it has two separate causes of action, namely, that the foreclosure action is an action *in rem*, whilst the subsequent action is an action *in personam* which arose only after the conclusion of the foreclosure proceedings. The learned trial judge held there was only one cause of action and that accrued on 26 September 1986, ie, seven days after the first notice of demand was sent and that the appellant should have filed the civil suit within six years from 26 September 1986.

It cannot be disputed that the loan agreement by its nature is a charge agreement executed between the parties and it governs the respondent's liabilities. Section 6(1) of the Act applies to an action founded in contract and tort and certain other actions whereas s. 21 of the same relates specifically to an action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land. In this present action, the appellant's suit to recover the shortfall sum arose out of the charge document. The respondent cannot therefore contract out of the provisions of the loan cum charge document. The said cl. 7 is clear and unambiguous. What is also clear is that the appellant's claim is not founded on a contract or tort action. It is purely a case for the recovery of the shortfall sum due under the said cl. 7 and not under the provisions of a contract. That being the case, we are of the view that s. 21(1) of the Act applies and not s. 6(1)(a) of the same, as contended by the respondent, and hence even if the cause of action did arise on 26 September 1986 as held by the learned judge, the civil suit was filed on 17 March 1995 and was thus well within the 12 years limit.

Learned counsel for the respondent argued that the claim to recover the shortfall was based purely on a contractual obligation and that the learned judge was correct in finding that the cause of action arose on 26 September 1986 and not on 16 March 1992. Counsel contended that the said land was auctioned off in 1992 and as such the charge was discharged. Counsel however failed to appreciate the fact that even if the charge has been

discharged by the auction, the shortfall was still due under the said cl. 7. Counsel referred to two cases in support of his submission, namely, *Ramdin v. Kalka Pershah* [1884-1885] LRIA 12 (PC) and *Kong Ming Bank Bhd v. Sim Siok Eng* [1982] 2 MLJ 205 (PC) p. 205. We find the above cases referred to do not appear to support his proposition of the law.

The learned judge, without the benefit of the assistance of both counsel with regards to the existence of s. 21(1) of the Act, *inter alia*, also rejected the claim of the appellant primarily by holding that the civil suit was barred by s. 6(1)(a) of the Act, quite apart from the issue of laches. On the issue of the equitable doctrine of laches which we find distinct from the statutory defence of limitation, it is our view that no evidence was proffered in the course of the trial below as to whether the appellant had taken a supine position in the conduct of the present action. The learned judge in fact had taken the view that since the respondent had successfully established a defence of limitation, it could equally be held that the equitable doctrine of laches was applicable. We are of the considered opinion view that he erred in arriving at such an erroneous conclusion, in view of the fact, that we hold on appeal that limitation has yet to set in, in this instance.

On the whole, having considered the provisions of s. 21(1) of the Act and on the facts of the case, we are of the view that the learned judge erred in arriving on his decision that s. 6(1)(a) of the Act is applicable. In our view the provisions of s. 21(1) of the Act are clear, and unambiguous, and therefore cannot be brushed aside. We hold that the civil suit was filed within the period of 12 years as stipulated by the provisions of s. 21(1) of the Act, and was therefore not statute-barred. We agree, however, with the finding of the learned judge, that the loan agreement was not illegal, and void, nor prohibited by law.

We allowed the appeal with costs, and judgment was accordingly entered for the appellant as prayed in prayers (a), (b) and (c) of the amended statement of claim. The counterclaim is dismissed. We also ordered that the deposit is to be returned to the appellant.